No. 10211

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES NATHAN LOWERY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

J. CHARLES DENNIS,
United States Attorney.

G. D. HILE,
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OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE.
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TABLE OF CONTENTS

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

This appeal involves the validity of the conviction of appellant on Count II of the Indictment (Tr. 3, 4) charging appellant with receiving, concealing, buying, selling and facilitating the transporta-

tion and concealment after importation of fifty ounces of smoking opium in violation of Title 21, U.S.C.A., Sec. 174.

Appellant's sole contention under his Assignments of Error (Tr. 60, 61) is that the evidence was obtained by unlawful search and seizure in violation of the Fourth and Fifth Constitutional Amendments. We confine our discussion to that contention.

Prior to the trial appellant sought to suppress the evidence which consisted of tins of smoking opium (Tr. 40, 44) by filing a Motion to Suppress. Accompanying the motion were two affidavits, one being that of appellant's attorney of record, and the other of appellant himself (Tr. 5-9). Nowhere do such affidavits or the motion make any claim that appellant was the owner of or claimed any interest in the opium seized, nor that appellant had the possession of the narcotics at the time of the search and seizure.

In opposition to appellant's Motion to Supress, the Government filed four affidavits (Tr. 9-23). To these appellant filed no counter-affidavits or statement. The Government's affidavits disclose that prior to the apprehension of appellant in the early morning of March 29, 1942, the Seattle Narcotics Bureau and

its officers had the following information in their possession:

1. That by virtue of a letter, dated June 11, 1941, received by the Seattle Narcotic Office from the California Office, appellant was believed to be engaged in narcotic activities between California and Montana as of that date (Tr. 10, 14, 20).

2. The Seattle Office, by virtue of an investigation made, ascertained that appellant had left Montana and had come to Seattle about August, 1941, and that appellant was making occasional trips away from Seattle possibly to procure narcotics (Tr. 14). Appellant was known to be residing in Seattle from August, 1941 to July, 1942 (Tr. 10-20).

3. About January or February, 1942, the Seattle Narcotics Office learned that one of their reliable confidential informants was in a probable position to advise when appellant would leave Seattle for the purpose of bringing back smoking opium (Tr. 14).

4. Thereafter in early March, 1942, this informant advised Narcotic Agent Donald R. Smith that appellant had received a letter from one Tony Alvarado of Jaurez, Mexico, which letter stated in effect:

"How are you?

"I got your letter today. My wife went to get it. Don't come until you get tela. with price and

everything. Price no trouble, I want to keep friendship."

Signed "Tony"

In conjunction with this letter the informant disclosed that appellant was going to make a trip south to obtain opium and that he would probably go by airplane (Tr. 10, 14, 15).

5. About March 22, 1942, this informant again advised the Seattle Office that appellant had received a telegram from Tony Alvarado of Jaurez, Mexico, which read as follows:

"I have ten carates good quality answer if you will come.

Tony" (Tr. 10, 11, 14)

Agent Smith checked the Spanish definition of the word "carates" and found it meant "liver spots" or "brown spots" and deduced that the word meant opium (Tr. 11).

6. On March 26, 1942, the officers were advised by the United Airlines at Seattle that a colored male generally answering appellant's description had booked passage by plane for El Paso, Texas, and further, that on the evening of March 26, 1942, a colored male had taken the 8:45 p. m. plane from Seattle, traveling on a round trip ticket, to El Paso; that he was traveling under the name of James Smith, but

that his baggage bore the initials "J.N.L.", the initials of the appellant (Tr. 11. 15).

El Paso, Texas, is just across the border from Jaurez, Mexico, from which the letter and telegram emanated (Tr. 11).

7. On March 28, 1942, the United Airlines at Seattle advised the officers that the said James Smith was booked to return to Seattle by plane and would probably arrive sometime between 8:00 P. M. on March 28, 1942 and 12:10 A. M. on March 29, 1942 (Tr. 11, 15).

8. The officers covered the arrival of both planes and the plane scheduled to arrive at Seattle at 12:10 A. M., March 29, 1942, actually arrived at 12:55 A. M. Appellant Lowery, who was known to one of the agents who recognized him, disembarked from the plane (Tr. 11, 18, 22). The officers, all of whom were in possession of the foregoing information, observed that after appellant left the plane he claimed his bag and proceeded to an automobile furnished by the United Airlines to its passengers. Before the appellant could enter the automobile he was intercepted by the officers who informed him that they were Federal officers and took possession of appellant's bag. The officers had no search warrant. The officers then escorted Lowery to the Federal Narcotic Office in Se-

attle by car. In this car when appellant was asked what he had in the bag, he replied in substance that the officers knew what he had in the bag, that he had ten cans (Tr. 18, 22). At the Seattle Narcotic Office appellant was asked by Supervisor Bangs what he had in the bag, to which appellant replied that he had ten cans of opium. Appellant then opened the bag producing the ten cans, further stating that he had obtained the opium at El Paso for $650 (Tr. 12, 16, 17, 18, 19, 22, 23).

On this state of the record the court on July 6, 1942, denied appellant's Motion to Suppress the evidence (Tr. 24).

The trial proceeded on the same date before the court sitting without a jury pursuant to appellant's request and waiver of trial by jury (Tr. 23, 24).

The only details of any moment here which were developed in addition to the facts stated above were that most of the contents of one of the tin cans had leaked out (Tr. 41); that the total smoking opium contained in the cans was about fifty ounces (Tr. 44); that the confidential informant in the case had theretofore been found reliable and had performed services for the Seattle Narcotic Office for about six months prior to appellant's apprehension (Tr. 42, 54, 55).

Government's Exhibit 1, 2 and 3 which were introduced at the trial were the ten cans of opium above referred to as being in appellant's bag (Tr. 40, 41, 46).

Appellant offered no evidence at the trial and was found guilty by the court on Count II of the Indictment (Tr. 25, 58) and was sentenced to 21 months in the United States Public Health Service Hospital, Fort Worth, Texas, and to pay a fine in the sum of $500, commitment until paid (Tr. 30).

QUESTION

The only question presented is whether or not the search and seizure involved was lawful without a search warrant.

ARGUMENT

Appellant is not entitled to invoke the protection of the Fourth and Fifth Amendments

Appellant, in his Motion to Suppress and his supporting affidavits, makes no claim to ownership or to any interest in the narcotics seized. As a matter of fact, appellant seems to deny that he even had posses-

sion of the narcotics because he makes the following allegations:

> "Affiant was not committing any crime in the presence of said agents" (Tr. 8)

and

> "That the defendant James Nathan Lowery was not committing any crime in their presence" (Tr. 6)

which would seem equivalent to a flat statement that appellant was not the owner, nor had any interest in, nor had intentional possession of the opium.

It is well established that one who seeks to question the legality of a search and seizure under the Amendments must be the owner of the property or have an interest therein and affirmatively claim his ownership or interest in his application for suppression. Mere physical custody is insufficient to entitle one to object that the search and seizure was unreasonable or that his constitutional rights were invaded.

Lewis v. United States (CCA 9), 6 F. (2d) 222;

Armstrong v. United States (CCA 9), 16 F. (2d) 62 (certiorari denied 273 U.S. 766);

Patterson v. United States (CCA 9), 31 F. (2d) 737;

Kwong How v. United States (CCA 9), 71 F. (2d) 71.

As appellant offered no evidence at the trial

(Tr. 55) no contention can be made that appellant made any claim of ownership to, or interest in, the opium seized subsequent to the hearing on the Motion to Suppress.

The Search and Seizure was lawful

The question is whether or not the facts and circumstances which came to the attention of the officers in the instant case prior to appellant's apprehension were sufficient to lead a reasonably discreet and prudent man to believe that appellant was unlawfully in possession of narcotics.

Carroll v. United States, 267 U.S. 132;

Husty v. United States, 282 U.S. 694.

It is exceedingly plain that under the facts of the case that the search and seizure was lawful even though without a search warrant.

Carroll v. United States, supra.

Husty v. United States, supra;

King v. United States (CCA 9), 1 F. (2d) 931;

Foster v. United States (CCA 9), 11 F. (2d) 100;

White v. United States (CCA 9), 16 F. (2d) 870;

McInes v. United States (CCA 9), 62 F. (2d) 180;

Leong Chong Wing v. United States (CCA 9), 95 F. (2d) 903;

Kwong How v. United States (CCA 9), 71 F. (2d) 71;

Mattus v. United States (CCA 9), 11 F. (2d) 503.

Appellant seems to argue that because the information given to the officers was "hearsay" that they could not act upon it. Such a contention cannot be sustained because in practically all of the cases above cited, the information of the officers was based on hearsay. As said in the *Husty* case, *supra*, at pp. 700-701:

> "To show probable cause it is not necessary that the arresting officer should have had before him legal evidence of the suspected illegal act."

In the *Carroll* and *Husty* cases the information of the officers was based on hearsay.

Appellant likewise contends (Tr. 14) that the officers had ample time in which to obtain a search warrant and that therefore the search and seizure was unlawful. The answer to this contention is two-fold:

First: The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable.

Carroll v. United States, supra, at p. 147.

Secondly: In the instant case the officers were not sure from their information that the "James Smith" reported to be traveling by plane was the appellant James Nathan Lowery. It was the fact of *appellant* being on the return plane which crystallized all prior information in the possession of the officers and gave the officers the right to act. The officers could not know positively that it was in fact appellant who was on the plane until he was observed disembarking. On these facts the officers were not required to speculate on the chances of later carrying out the search and seizure after the delay which would then have been required for one or more of them to obtain a search warrant.

Husty v. United States, supra, at p. 701

This would seem to be particularly true in this case where appellant was merely in the process of transferring himself and his bag from one vehicle to another and renders inappropriate the cases cited by appellant which relate to searches and seizures of structures or dwellings.

In our opinion a discussion of appellant's authorities is unnecessary because he has not cited a single case from this Circuit, nor has appellant, in our view, cited any case which is in point. Many of his

cases are contrary to his own position and are in favor of the Government's position. In the main, they relate to searches and seizures of dwellings rather than of the person or mobile units.

CONCLUSION

The lower court committed no error in denying appellant's motion to suppress and in overruling all of appellant's objections to the evidence which were based thereon.

The judgment should be affirmed.

Respectfully submitted,

J. CHARLES DENNIS,
United States Attorney.

G. D. HILE,
Assistant United States Attorney.

Attorneys for Appellee.